1269

SUPREME COURT OF THE UNITED STATES.

No 81.

GLENDY BURKE, PLAINTIFF IN ERROR,

vs.

ROBERT McKAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Writ of summons	1	2
Marshal's return	2	2
Declaration	2	3
Issue joined	4	4
Jury sworn—Verdict	4	4
Bill of exceptions	5	4
Judgment	8	6
Clerk's certificate	9	6
Writ of error	10	7
Copy of appeal bond	11	7

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GLENDY BURKE
vs.
ROBERT MCCAY.

Pleas before the honorable Samuel J. Gholson, district judge of the United States, at a circuit court of the United States held at the town of Jackson, in and for the ninth circuit and southern district of Mississippi, at the November term, in the year of our Lord one thousand eight hundred and forty-two.

Be it remembered, that heretofore, to wit, on the 30th day of March, A. D. 1841, the following writ of summons ad respondendum issued out of the clerk's office of the court aforesaid, in the words and figures, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi, ss:

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you, without delay, to summon Robert McCay, a citizen of the State of Mississippi, that he be and appear at the circuit court of the United States, to be held at the town of Jackson, in and for the southern district of Mississippi, on the first Monday of May next, to answer to Glendy Burke, a citizen of the State of Louisiana, of a plea of trespass on the case to his damage four thousand dollars; and that he do file his plea or defence with the clerk of said court on or before the meeting of the same, or judgment will be given against him by default; and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the 30th day of March, A. D. 1841, and of the independence of the United States the sixty-fifth.

[L. S.]

WM. BURNS, *Clk.*
By GEO. W. MILLER, *D. C.*

Marshal's return.

"Executed on Robt. McCay, the 20th of April, 1841, by leaving a copy at his usual place of abode.

F. S. HUNT, *Marshal.*
By P. C. HULL, *Deputy.*"

And afterwards, to wit, on the said 30th day of March, A. D. 1841, the plaintiff, by his attorneys Norcom and Mason, filed his declaration herein against the said defendant in the words and figures, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi, ss:

Circuit court United States, May term, 1841.

Glendy Burke, a citizen of the State of Louisiana, plaintiff, by attorney, complains of Robert McCay, a citizen of the State of Mississippi, in custody, &c., of a plea of trespass on the case; for this, that heretofore, to wit, on the 20th day of January, in the year 1837, at Clinton, Miss., to wit, in the district aforesaid, certain persons, by the names of R. E. Stratton, Sam'l W. Dixon, and B. Garland, made their certain promissory note in writing of that date; and thereby then and there promised to pay, on the first day of January, eighteen hundred and forty, to one Robert Mathews or order, by the name of Robert Mathews, the sum of twenty-eight hundred dollars and cents, for value received, and then and there delivered said note to the said Mathews; and the said Mathews, by the name of Robert Mathews, then and there endorsed and delivered said note to the defendant, who then and there, by the name of Robert McCay, endorsed and delivered the same to plaintiff.

And the plaintiff avers that afterwards, when said note became due and payable according to its tenor and effect, to wit, on the 4th day of January, in the year 1840, the said note was duly presented and shown to the several makers thereof, to wit, Stratton, Dixon, and Garland, to wit, at the district aforesaid, for payment; and payment of the sum of money therein specified was then and there duly required of the said makers of the said note, but that neither the said makers nor defendant, nor any other person or persons, did or would pay said sum of money mentioned in said note to the plaintiff when the said note was so presented and shown for payment, and payment of the sum of money therein specified was so demanded as aforesaid, or before or afterwards, but neglected so to do; of all which premises, the said defendants afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, had notice; by means of which the said defendant then and there became liable to pay to the said plaintiff the sum of money specified in said note when thereunto afterwards requested; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and promised the plaintiff to pay him the said sum of money specified in said note when thereunto afterwards requested.

Yet the said defendant (although often requested) hath not paid said sum of money, or any part thereof, to the plaintiff, but to do so, hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the plaintiff's damage four thousand dollars. Therefore he sues.

NORCOM & MASON,
Plaintiff's attorneys.

And now, at the May term, 1841, of the said court, comes the defendant, Robert McKay, by his attorney, and defends the wrong and injury, &c., and for plea says, the said plaintiff his action hereof ought not to have and maintain, because he says he did not assume and undertake in manner and form as the said plaintiff against him hath complained; and of this he puts himself upon the country.

FOUTE, *Atty. P. D.*

And plaintiff likewise.

NORCOM & MASON,
Plaintiff's attorneys.

And afterwards, to wit, at the said November term of the court first aforesaid, to wit, on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and forty-two, until which time this cause was legally continued, came the parties aforesaid by their respective attorneys; and a jury being called, came, to wit, George W. Clark, Joseph H. Harvey, L. S. Evans, F. M. Boarman, John R. Chiles, W. G. Blake, E. S. Evans, Major Craft, J. F. Summers, W. C. Paige, W. J. McGuire, and Joseph Jarvis, jr., who, being empannelled, tried, and sworn to speak the truth, upon the issue joined, upon their oaths do say, that they find for the defendant upon the issued joined.

Bill of exceptions tendered by the plaintiff.

This was an action of assumpsit brought by the holder of a promissory note against the endorser. (See the declaration heretofore copied.)

On the trial, the plaintiff read the note and the endorsements thereon; he also read, by agreement of parties, a statement in writing of S. Humphreys, who was absent and sick, for the purpose of proving a demand and notice of non-payment to the endorser, to wit:

UNITED STATES OF AMERICA,
State of Mississippi, Hinds county:

By this public instrument of protest, be it known that, on this fourth day of January, 1840, at the request of James G. Paul, teller, the holder of the original note, of which a true copy is here endorsed, I, S. W. Humphreys, J. P., residing in the town of Clinton, Hinds county, Mississippi, qualified according to law, went to the house of Richard E. Stratton and presented the said note, and demanded payment, which was refused; I also went to the house of Samuel W. Dixon, and demanded payment, which was refused; I also went to the office of Burr Garland, in the town of Clinton, and there was no person of whom to make a demand.

Whereupon, I, the said S. W. Humphreys, J. P. and ex-officio notary public, at the request aforesaid, do hereby solemnly and publicly protest the said note, as well against the drawer thereof as against the acceptors, endorsers, and all who are or may be con-

cerned, for all exchanges or re-exchanges, costs, charges, damages, and interest, suffered, or to suffer, for non-payment of said note thus solemnly done and protested.

Given under my hand and seal, at my office at Clinton, the day and year above written.

S. W. HUMPHREYS, *J. P.* [SEAL.]
Acting notary public.

$2,800. CLINTON, MISS., *January* 20, 1837.

On the first day of January, eighteen hundred and forty, we, or either of us, promise to pay Robert Mathews or order twenty-eight hundred dollars, for value received.

R. E. STRATTON,
SAM'L W. DICKSON,
B. GARLAND.

Endorsed: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest if not paid at maturity.

ROBERT MATHEWS."

CLINTON, 28*th April*, 1838.

The above assignment made in presence of the undersigned witness. J. A. McRAVEN.

"Robert McKay" pay J. Roach, esq., "cashier or order."

THOS. E. ROBINS, *Cashier*.
By R. R. ROBINSON.

Notice of protest directed to R. E. Stratton, Clinton, Mississippi.

Notice of protest directed to Sam'l W. Dickson, at Brownsville, Mississippi.

Notice of protest directed to B. Garland, at Clinton, Mississippi.

Notice of protest directed to Robt. McKay, at Holmesville, Pike county, Mississippi.

Notice to Robert Mathews, directed to Carrollton, Carroll county, Mississippi.

Notice to Tho. E. Robins, cashier, directed to Vicksburg, Warren county, Mississippi.

All of the above named notices were put in the post office at Clinton by me, on the 4th day of January, 1840, before 9 o'clock at night.

S. W. HUMPHREYS, *J. P.*

The defendant, Robert McCay, in this case admits that, at and before the first and fourth of January, 1840, he did reside at Holmesville, Pike county, Mississippi, and that the certificate of protest and sending notices, &c., made and signed by S. W. Humphreys, and filed in this case, shall be received as the evidence of said Humphreys, (who is sick, and cannot attend court,) and that

said Humphreys, if present, would swear to all the facts stated in the said certificate.

Defendant also admits that, in a settlement with the makers of the note in the declaration mentioned, of and concerning two judgments defendant had against them upon two other notes of same amount which fell due 1st and 4th January, 1838 and 1839, this note was included, and defendant has released said makers from all liability to him on said notes; but defendant denies that he has ever received of said makers full payment of said note; and that, upon a compromise of all claims and controversies between them, he released said drawers as aforesaid from any liability to defendant. Defendant agrees that this statement shall be read and received upon the trial of this case by the court and jury.

Nov. 18, 1842. ROBERT McCAY.

The defendant admitted his residence was at Holmesville, Pike county, at the maturity of the note; and here plaintiff rested his case.

The court instructed the jury that, in order to charge the endorser of a promissory note, the plaintiff must prove that it was protested, on the day of its maturity, by a notary public, and demand made, and notice of non-payment given by him. That the statement of Humphries admitted as evidence not proving that fact, they must find for the defendant; whereupon, a verdict for defendant was rendered.

The plaintiff, by attorney, excepted to the charge of the court before the jury left the box; which exceptions were signed and sealed, and ordered to be made a part of the record, which is done accordingly.

S. J. GHOLSON. [SEAL.]

Therefore, it is considered by the court that the said Glendy Burke, plaintiff, take nothing by his bill, but for his false clamor, be in mercy, &c.; and that the said Robert McKay, defendant, go hence without day, and recover of the said plaintiff his costs and charges by him about his defence in this behalf expended.

UNITED STATES OF AMERICA,
Southern district of Mississippi:

Circuit court U. S.

I, William H. Brown, clerk of said court, do hereby certify that the foregoing eight pages contain a full, true, and complete transcript of the record of the judgment in the case therein named, as the same now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Jackson, this 29th day of December, A. D. 1842.

[L. s.]

W. H. BROWN, *Clk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between Glendy Burke, plaintiff, and Robert McKay, defendant, a manifest error hath happened, to the great damage of the said Glendy Burke, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the second Monday of January, in [L. S.] the year of our Lord one thousand eight hundred and forty-three, and of the independence of the United States the 67th.

W. H. BROWN, *Clk.*

Issued the 28th day of January, A. D. 1843.

UNITED STATES OF AMERICA,
Southern district of Mississippi, sct:

Know all men by these presents, that we, Glendy Burke, F. Norcom, and E. Mason, are held and firmly bound unto Robert McKay in the just and full sum of two hundred dollars, lawful money of the United States, to be paid to the said Robert McKay or his lawful attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 1st day of January, A. D. one thousand eight hundred and forty-three.

The condition of this obligation is such, that whereas, at a term of the circuit court of the United States for the southern district of Mississippi, commenced and held at the city of Jackson, on the first Monday of November, A. D. 1842, judgment was rendered by said court in favor of the said Robert McKay against the said Glendy Burke for the costs of suit, and the said Glendy Burke hath sued out a writ of error from the Supreme Court of the United